Filed 5/24/04 P. v. Borhan CA2/5
Opinion received for posting 10/20/04

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAYMAN BORHAN, Defendant and Appellant.	B166670 (Los Angeles County Super. Ct. No. KA048417)

APPEAL from a judgment of the Superior Court of Los Angeles County, Theodore D. Piatt, Judge. Affirmed with modifications.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Alan D. Tate, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Payman Borhan, appeals from his convictions for two counts of lewd acts upon a child under the age of 14. (Pen. Code,[1] § 288, subd. (a).) The jury also found that defendant committed the offenses on more than one victim at the same time and in the identical course of conduct. (§§ 667.61, subd. (b), 1203.066, subd. (a)(7).) Defendant argues the trial court improperly denied his motion to substitute retained counsel and admitted propensity evidence. The Attorney General argues the defendant's presentence credits must be adjusted. We affirm and modify the judgment to alter the presentence credit award.

II. FACTUAL BACKGROUND

A. The charged offenses

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On approximately March 1, 2000, V.L. and G.M. were 10 years old. V. and G. were cousins. Defendant installed a water filtration system at V.'s father's home that day. Defendant told V.: "You are a beautiful young lady. Would you like to be in a commercial?" V. responded affirmatively. Defendant later came to V.'s mother's home for an interview and "audition." Defendant demonstrated dance steps for V. to use in the alleged commercial. After about 10 minutes, V.'s mother left to do laundry. However, V.'s 16-year-old sister, Vanessa, was present. V.'s brother was also present for part of the time. At one point, defendant had V. sit on his lap and say, "I love you, Daddy." Defendant

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

instructed V. to do a "cheerleading kind of routine." Thereafter, defendant danced with V. As they danced, defendant placed his leg between her legs. The top of defendant's knee touched V.'s vaginal area for approximately seven seconds. V. believed defendant intentionally touched her. V. became uncomfortable and scared because she knew she should not be touched there.

Shortly thereafter, V. saw G. arrive. V. called G. into the kitchen. Defendant told V. and G. to stand straight. Defendant told the two girls they were not standing up straight. Thereafter, defendant placed his open hands, palm up underneath V.'s breasts and pushed upwards for six or seven seconds. Defendant then did the same to G. V. was very uncomfortable. V. also believed defendant had intentionally touched her breasts. V. also believed defendant intentionally touched G.'s breasts. Defendant also placed one hand on V.'s upper breast area and his other hand on her back shoulder blade to straighten her posture. V. testified as to what happened next, "I told him that I wanted to go and tell my mother something." V. then testified, "I went outside and told my mother." V.'s mother told defendant they had to go somewhere. Thereafter, V.'s mother telephoned the police.

G. recalled being present from the beginning of V.'s audition. V.'s mother encouraged G. to join in the "audition." G. saw defendant touch V. inappropriately with his leg. G. also saw defendant place both of his hands underneath V.'s breasts and lift up. Defendant was smiling at the time. G. thought V. appeared uncomfortable. During the skit, defendant had V. repeatedly say, "Oh, Daddy." Defendant simultaneously placed his leg between V.'s legs and touched her "private parts" or vaginal area with his knee. V. looked very uncomfortable again. Defendant also told G. to stand up straight and placed his hands underneath her breasts and lifted up. G. felt "very weird" and uncomfortable that someone unknown to her had touched her. G. knew that what defendant was doing was wrong. G. believed defendant's acts were intentional. G. did not say anything because she was scared and nervous.

Vanessa L. is V.'s sister. Vanessa saw defendant place his hand underneath V.'s breast for approximately five seconds. Defendant looked happy at the time. Vanessa also saw defendant place his leg between V.'s legs. It appeared to Vanessa that defendant's knee area touched V.'s private area for five or six seconds. V. looked very serious and uncomfortable. Vanessa was not present during the entire time defendant was auditioning her sister.

Jose Gonzalez was the president of Continental Water Softener Company in March 2000. Defendant was a subcontractor for Mr. Gonzalez's company at that time selling water purification systems. The company was not in the process of making any commercials or advertisements at that time. Defendant was not authorized to audition anyone for commercials or modeling advertisements.

B. The uncharged crimes

In July 1998, Cynthia T. was 23 years old. Defendant drove by Ms. T.'s home. Defendant told her he was a talent scout for the Ford Modeling Agency looking for models for commercials. Defendant gave Ms. T. his business card. Defendant later auditioned Ms. T. at her home. Defendant showed Ms. T. a portfolio of photos of different "girls" with whom he worked. Defendant had Ms. T. read a few lines and walk back and forth. Defendant got behind her. Defendant moved his hands up and down Ms. T.'s body and instructed her how to move. Defendant cupped Ms. T.'s breasts then moved his hands up and down her chest and waist area. Ms. T. was uncomfortable. Defendant also touched Ms. T.'s breast as he ostensibly tried to straighten her posture. Later, defendant had Ms. T. do a love scene where she was to kiss him. Defendant repeatedly told Ms. T. to kiss him. Defendant kissed Ms. T. and placed his tongue in her mouth. Ms. T. backed off in surprise. Ms. T.'s mother entered the room. Ms. T.'s mother screamed at defendant and told him to leave.

In August 1998, S.L. was approached by defendant as he drove in her neighborhood. Defendant stopped Ms. L. as she was on the sidewalk. Defendant said he owned a water business and was looking for actresses for a commercial. Ms. L. was 21 years old. Defendant went to Ms. L.'s apartment to audition her. Defendant told her he was going to do a dance routine with her because that would be used in a commercial for a water company. After a few dance spins and dips, defendant stood behind Ms. L. and placed one hand over her chest and inside her bra. Defendant placed his other hand on her groin area. When Ms. L. asked what he was doing, defendant responded: "Oh, it's okay. It's okay." Ms. L. managed to free herself from that position. Ms. L. told defendant she no longer wanted to participate in the "audition." Ms. L. believed defendant grabbed her breast intentionally as he restrained her. Defendant had also asked her to rehearse kissing him. Ms. L. did not want to do so. Ms. L. also believed defendant intentionally pressed down hard on her pubic area. Defendant had also attempted to straighten Ms. L.'s posture.

Also during August 1998, defendant went to the home of Brenda C. for an audition for commercials. Ms. C. met defendant through her sister, whom he had initially approached. Ms. C.'s parents were present when defendant arrived at 9 p.m. Following introductions, defendant asked Ms. C.'s parents to leave the room so they would not influence the audition. Defendant had a photo portfolio with pictures of other young women. Defendant showed Ms. C. how to walk and stand up straight by using his hand behind her back. Defendant used his other hand to lift her breast. Defendant lifted her breast up several times. Initially, Ms. C. did not feel anything was "weird." Defendant also showed Ms. C. how to tango. As he held her back he placed his leg between her legs. At another time during the dancing, defendant's hand slipped into her shirt under her bra. Defendant's hand touched Ms. C.'s right breast. Ms. C. felt uncomfortable but thought it was "procedure." Ms. C. believed defendant intentionally put his hand under her bra and grabbed her. Ms. C. pushed defendant away. Defendant then had Ms. C. to act excited about having won a car, run up to him, and then hug him.

After repeating that several times, defendant told Ms. C. to tell him how much she loved him and hold his face next to hers. When Ms. C. did so, he grabbed her face and stuck his tongue in her mouth. Ms. C. was "disgusted" and pushed him away. When Ms. C. refused to repeat that "move," defendant told her she had passed the audition.

III. DISCUSSION

A. Substitution of Counsel

Defendant argues the trial court improperly denied his motion to substitute retained counsel.

1. Factual and procedural background

The preliminary hearing was conducted on August 12, 2002. Defendant was represented by retained counsel at the preliminary hearing. On August 26, 2002, defendant appeared in court and waived time for trial and arraignment. Defendant was represented by the public defender's office at that hearing. At the time of the September 4, 2002, arraignment, defendant was represented by Deputy Public Defender Kenneth Wenzyl. Defendant also appeared with Mr. Wenzyl on October 17, 2002. Defendant was a "miss-out" on November 15, 2002, when a readiness conference was held. On November 19, 26, and December 3, 2002, defendant was present "in lock up" when his jury trial was trailed. On December 4, 2002, defendant was present "in lock up" when the matter was transferred to Division 7 for jury trial. Later that day, the cause was called for trial. A panel of prospective jurors was given the perjury admonishment in defendant's presence. Immediately thereafter, defendant stated he needed to speak to the court. The trial court advised defendant that would occur later and continued to address the jury. Defendant, again in the jurors' presence, interrupted

stating: "Excuse me, Your Honor, I'm not— [¶] [¶] My family's bringing a private lawyer. I really do not wish to go to the trial." The trial court responded, "This case is going to be tried in this courtroom and tried today." Again, defendant spoke out: "Excuse me. It has—it has not been communicated— [¶] [¶] He has not seen me since yesterday. My public defender has not come to see me, Sir. I have been wanting to talk to him since yesterday that I don't want to go through to trial because last night—night—I talked [sic] my family. My mother of my daughter from Mexico called, and she's bringing—" The trial court responded: "Sir, we're going to try this lawsuit in this courtroom. Today. And I don't want you to say another word now while the jurors are in the courtroom. Not one more word." Defendant continued in the presence of the jurors to interrupt the trial court. The trial judge asked the prospective jurors to leave the courtroom.

Thereafter, the trial court again advised defendant that the trial would go forward. The trial court explained, "You happen to be represented by one of the best public defenders in our district who's been in my court for years numerous times, and I'm not going to accept any comments from you on the date of trial about the ineffective assistance of your lawyer." The trial court further explained: "[Y]ou're telling me today that on the day of trial, the last day of trial, that you've got somebody that's ostensibly bringing in another attorney to represent you. It's not accepted by me. This matter came from another department. It—it was answered ready. It's going to be tried." The trial court admonished defendant not to speak out when court was in session. The trial court also stated, "I'm not going to hear anything else about continuance of this trial on this." Defendant then explained to the trial court, "I had not seen Mr. Wenzl since about two months, or two months ago." Defendant then changed his story. Defendant said, "I have not seen him since yesterday." Defendant stated, "So what I did yesterday after I asked him in the afternoon, I said, you know, are you going to bring the psychiatrist. he said, no, I'm not bringing the psychiatrist." Defendant continued on, "I did not know yesterday when I called and he said D.A. did not accept

that." Defendant then indicated there was a conflict of interest with Mr. Wenzl. The trial court asked the prosecutor to leave the courtroom so that it could conduct a substitution of counsel hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 122.

Thereafter, defendant explained: "But so I asked him that, you know, that I like to – I like to get him a – have interview with like four people and out that four people, only one interview was done. [¶] . . . [T]he other three interview was not done . . . ." Defendant further disagreed with Mr. Wenzl's decision not to call a psychiatrist as a witness. Defendant also expressed unhappiness with Mr. Wenzl's refusal to bring a "95" motion. Defendant requested that the trial court appoint another public defender. In the alternative, defendant requested permission to hire a private attorney. The trial court stated: "I will consider that a motion that you're making right now. You're making a motion to discharge your lawyer?" Defendant responded, "Yes." The trial court stated, "And get another attorney?" Defendant responded, "Please." The trial court responded, "That motion is made, and that motion is denied." Mr. Wenzl denied having not seen defendant in over a two-month period. Mr. Wenzl explained he had spoken with a deputy district attorney, a Ms. Cady, about an unidentified psychiatrist's recommendation for a one-year program. The prosecutor refused to enter into a disposition which only required defendant participate in a one-year program. Defendant indicated he would not accept the 10-year offer. Mr. Wenzl relayed Ms. Cady's offer to defendant—10 years in prison.

Defendant then asked if he could retain a private lawyer. Defendant explained that he spoke to the mother of his daughter in Mexico the previous evening. She indicated she would send money. Defendant also stated he spoke to his fiancée in Canada, who would also send money. The trial court responded, "Not timely." Defendant continued to explain about his family concerns and mental health. The trial court ultimately stated: "I'm going to instruct my reporter to not report anything else that [defendant] says. He's attempting to obstruct these proceedings with—he's attempting to obstruct the proceeding. We're going to call the jury back inside. We're

going to select the jury. . . . [T]he trial will begin, and the trial will end. And I'm not going to continue the case, and I'm not going to let you bring another lawyer in on the last day of ten days of ten."

Thereafter, the trial court again explained to defendant that he would be required to be quiet during the trial or would be removed from the courtroom. Defendant again stated he wanted another lawyer. The trial court responded: "You can't have another lawyer. You can't continue this case. [¶] . . . [¶] You haven't stated any grounds for discharging [defense counsel] from this lawsuit. You haven't stated any grounds." Defendant then said, "Yesterday I asked Mr. Wenzl . . . I said, can I . . . bring a private lawyer to work with you joint . . . ." The trial court indicated: "I don't care if somebody else come here, but [defense counsel] is your attorney; and he makes the decision. I don't care if somebody else comes in." Jury selection continued. On the following day, defendant stated: "Pardon me, Your Honor. Excuse me. I see the private counsel my family brought in has left. I'm putting my trust in God, and I am going to continue." The record does not make any other reference to the purported private counsel's alleged presence.

2. Substitution of retained counsel

The California Supreme Court has held: "The right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing. [Citations.]' [Citation.]" (*People v. Courts* (1985) 37 Cal.3d 784, 789, quoting *People v. Holland* (1978) 23 Cal.3d 77, 86, overruled on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7.) However, the Supreme Court has held: "[T]he right [to retain counsel of choice] 'can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citations.]" (*People v. Courts, supra,* 37 Cal.3d at p. 790, original italics, quoting

People v. Crovedi (1966) 65 Cal.2d 199, 208; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 849-850.) The Supreme Court has held: "The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.' [Citation.]" (*People v. Courts, supra,* 37 Cal.3d at p. 790, quoting *People v. Byoune* (1966) 65 Cal.2d 345, 346.) In *People v. Ortiz* (1990) 51 Cal.3d 975, 983-984, the Supreme Court held: "[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (Accord, *People v. Lara* (2001) 86 Cal.App.4th 139, 153.)

The *Courts* decision concluded: "A continuance [for the purpose of retaining an attorney] may be denied if the defendant is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (*People v. Courts, supra,* 37 Cal.3d at pp. 790-791; *People v. Byoune, supra,* 65 Cal.2d at pp. 346-347 *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850.) On review, we look to the circumstances and reasons presented to the trial court at the time the request was denied to determine whether the denial was so arbitrary as to violate due process. (*People v. Frye* (1998) 18 Cal.4th 894, 1013; *People v. Courts, supra*, 37 Cal.3d at p. 791; *People v. Crovedi, supra,* 65 Cal.2d at p. 207; *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850.) The defendant has the burden of demonstrating an abuse of discretion. (*People v. Courts, supra,* 37 Cal.3d at p. 791; *People v. Strozier* (1993) 20 Cal.App.4th 55, 60; *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.)

In this case, defendant waited until the jury was present to request a continuance for purposes of retaining counsel. Defendant did not have the name of the lawyer or

any way of verifying the attorney could go forward with the trial in a short period of time. Defendant did not demonstrate sufficient circumstances supporting his request to continue the trial. The record does not suggest defendant made a good faith, diligent effort to retain counsel before trial. As a result, defendant has not met his burden to show the trial court abused its discretion in denying his request for a continuance to secure new counsel. (*People v. Jeffers, supra,* 188 Cal.App.3d at p. 850; *People v. Rhines* (1982) 131 Cal.App.3d 498, 506.)

3. Substitution of appointed counsel

Moreover, the trial court could properly rule that defendant was not entitled to new appointed counsel. The California Supreme Court recently reiterated: "The governing legal principles are well settled. '"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." [Citations.]'" (*People v. Hart* (1999) 20 Cal.4th 546, 603, quoting *People v. Fierro* (1991) 1 Cal.4th 173, 204 and *People v. Crandell* (1988) 46 Cal.3d 833, 854; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 718; *People v. Barnett* (1998) 17 Cal.4th 1044, 1085; *People v. Hines* (1997) 15 Cal.4th 997, 1025.)

We review the trial court's denial of the motion for substitution of counsel for abuse of discretion. (*People v. Earp* (1999) 20 Cal.4th 826, 876; *People v. Hart*, *supra*, 20 Cal.4th at pp. 603-604; *People v. Horton* (1995) 11 Cal.4th 1068, 1102; *People v. Memro* (1995) 11 Cal.4th 786, 857; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Although defendant had a right to an adequate and competent defense, he did not have the right to present a particular theory of exculpation of his choosing. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729; see *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) Tactical disagreements between a defendant and counsel do not alone establish an "'irreconcilable conflict.'" (*People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729; *People v. Hines, supra,* 15 Cal.4th at pp. 1025-1026; *People v. Carpenter* (1997) 15 Cal.4th 312, 376 ["When a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant"].) Moreover, it is an abuse of discretion for the court to appoint new counsel absent a showing the appointed attorney does not or cannot adequately represent the accused. (*People v. Smith* (1993) 6 Cal.4th 684, 696; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1022-1023, overruled on a different point in *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1069, fn. 6.)

At the time the *Marsden* hearing was conducted, defendant's reasons for requesting the appointment of new counsel related to Mr. Wenzl's: inability to convince a prosecutor, Ms. Cady, to accept a plea and psychiatric placement; refusal to call the psychiatrist as a witness; failure to interview all the witnesses defendant suggested; and refusal to make what appears to be a section 995 motion. Mr. Wenzl refuted the claim there had been no meeting for over two months with defendant. (This occurred after defendant contradicted his two-month story.) It was also apparent Mr. Wenzl had been involved in defendant's case and made tactical decisions regarding that representation. In this instance, the trial court provided defendant with the opportunity to set forth any complaints about Mr. Wenzl. The trial court further took comments from Mr. Wenzl, who explained what had occurred regarding the psychiatric report and plea discussions. The trial court could reasonably conclude that Mr. Wenzl's representation of defendant was neither inadequate nor marked by irreconcilable conflict. The trial court did not abuse its discretion in denying defendant's substitution of counsel motion.

B. Evidence of Prior Sexual Misconduct

Defendant argues the trial court improperly admitted propensity evidence pursuant to section 1108. Defendant further argues that the admission of such evidence violated his federal constitutional rights to due process and equal protection.

1. Evidence Code section 402 hearing

Prior to trial in this case, the prosecutor sought to introduce evidence of three prior incidents involving defendant's touching of young women in the breast and vaginal areas while "auditioning" them for commercials pursuant to Evidence Code sections 1101, subdivision (b)[2], and 1108[3]. The prosecutor, Pak Kouch, explained she sought to introduce the evidence pursuant to Evidence Code section 1101, subdivision (b) to demonstrate motive, specific intent, plan, knowledge of wrongfulness, identity, and that the acts were not accidental. The prosecutor also argued that the evidence fell

---

[2] Evidence Code section 1101 provides in pertinent part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

[3] Evidence Code section 1108 provides in pertinent part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

within the Evidence Code section 1108 exception because defendant committed almost identical acts on three previous occasions wherein he touched the breasts and vaginal areas of young women under the pretense of a demonstration during their audition for a commercial. In finding the evidence admissible, the trial court made specific findings: "And I'm going to make the finding, part of the argument against it underscores why it's relevant; and that is that [the prosecutor is] obligated to prove a sexual intent in this case. And under [Evidence Code section] 1101[, subdivision (b)], that would be admissible. [The prosecutor] made the motion under both [Evidence Code sections] 1101[, subdivision (b)] and 1108. [¶] [Evidence Code section] 1101[, subdivision (b)] never permitted propensity evidence. Section 1108 is a legislative enactment that propensity evidence is admissible unless the probative value is substantially outweighed by the prejudicial effect. And in this case, considering the great similarity in the offenses and the fact that there is a series of elements that [the prosecutor] referred to in her motion which have to be proved, that occurs to me it's relevant. [¶] And it is given with a limiting instruction at the time that the evidence is presented to the jury, and presumably the jury will follow the limiting instruction; but I do not believe that the prejudicial effect outweighs the probative value when we consider the present offenses and what [the prosecutor] has to prove, rather than accident or mistake, and that [the prosecutor] does have to prove intent." The jurors were instructed with CALJIC Nos. 2.50, 2.50.1, and 2.50.1, which explained the limits within which they could consider such prior sex offenses.

2. Waiver of constitutional claim

Preliminarily, defendant's constitutional contention was not the basis of an objection in the trial court and thus is the subject of waiver, forfeiture, and procedural default. (*United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Vera* (1997) 15 Cal.4th 269, 274; *People v. Padilla*

(1995) 11 Cal.4th 891, 971, overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Walker* (1991) 54 Cal.3d 1013, 1023; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10; *People v. Yarbrough* (1997) 57 Cal.App.4th 469, 477-478.)

3. Admissibility of evidence

Notwithstanding that waiver, we review the trial court's rulings concerning the admissibility of evidence for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Rowland* (1992) 4 Cal.4th 238, 264.) In *People v. Falsetta* (1999) 21 Cal.4th 903, 911, the California Supreme Court held: "Available legislative history indicates [Evidence Code] section 1108 was intended in sex offense cases to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and defendant's credibility. In this regard, [Evidence Code] section 1108 implicitly abrogates prior decisions of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*Ibid.*; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 281; *People v. Frazier* (2001) 89 Cal.App.4th 30, 40.) The *Falsetta* court clarified: "Under [Evidence Code] section 1108, courts will retain broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value. (See, e.g., [*People v.*] *Harris* [(1998)] 60 Cal.App.4th [727,] 740-741 [reversing conviction]; [*People v.*] *Fitch* [(1997)] 55 Cal.App.4th [172,] 183.) We have no reason to assume [] that 'the prejudicial effect of a sex prior will rarely if ever

outweigh its probative value to show disposition.'" (*People v. Falsetta, supra,* 21 Cal.4th at p. 919.)

Because the trial court found that the evidence was admissible under both Evidence Code sections 1101, subdivision (b) and 1108, we could find error only if the testimony was inadmissible under both sections. (See *People v. Branch, supra,* 91 Cal.App.4th at pp. 280-281.) In fact, without abusing discretion, the trial court could have concluded the testimony was admissible under both sections. The current offenses and the uncharged crimes were within those defined by Evidence Code section 1108, subdivision (d), as "qualifying 'sexual offenses.'" (*Id.* at p. 281.) The trial court found there was great similarity in the prior uncharged offenses and the current crimes. Moreover, as our colleagues in Division Seven of this appellate district held: "The . . . crimes need not be sufficiently similar that evidence of the [prior sex offenses] would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in [Evidence Code] section 1108." (*People v. Frazier, supra,* 89 Cal.App.4th at pp. 40-41.) In addition, the trial court could properly find that the evidence of prior sex offenses was admissible to establish intent pursuant to Evidence Code section 1101, subdivision (b). (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900.) Also, the trial court did not abuse its discretion in failing to exclude the evidence of prior sexual misconduct pursuant to Evidence Code section 352[4]. The trial court gave detailed reasons for admitting the prior sex offense evidence and indicated that it was weighing those matters pursuant to Evidence Code section 352.

---

[4] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Defendant argues that the recent Ninth Circuit Court of Appeal decision in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 773-776, overruled on another point in *Woodford v. Garceau* (2003) 538 U.S. 202, 210, dictates reconsideration of the California Supreme Court holding in *Falsetta*. We disagree. We are bound by the California Supreme Court's holding in *Falsetta.* (*Musser v. Provencher* (2002) 28 Cal.4th 274, 287; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, even if we had authority to revisit the *Falsetta* finding that Evidence Code section 1108 does not violate due process, a lower federal court's holdings are not binding on state courts even when they concern federal questions. (*People v. Camacho* (2000) 23 Cal.4th 824, 830; *In re Tyrell J.* (1994) 8 Cal.4th 68, 76.) In any event, the findings of *Garceau* are not instructive. The Ninth Circuit found, as did the California Supreme Court, that the instruction given related to evidence introduced pursuant to Evidence Code section 1101, subdivision (b) improperly allowed the jurors to consider the evidence for any purpose, including criminal disposition. The Ninth Circuit merely disagreed with the Supreme Court's harmless error finding.

4. Harmless error

Nonetheless, any error in admitting the evidence of defendant's prior sex offenses was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 36; *People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Watson* (1956) 46 Cal.2d 818, 836.) No witnesses testified for the defense. Both V. and G. gave convincing testimony regarding defendant's acts against them. Their testimony was corroborated by Vanessa, who was present part of the time when defendant inappropriately touched V. Moreover, the testimony could be properly admitted pursuant to Evidence Code section 1101, subdivision (b). Given the uncontroverted nature of the prosecution case, any error was harmless.

C. Presentence Credits

The Attorney General argues that defendant's presentence credits were inaccurately computed. We agree with the argument, but disagree with the calculations. The failure to award a proper amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Defendant received an incorrect award of presentence credits. (§§ 2900.5, 2933.1.) He should have received 35 days of conduct credit as well as 243 days actual credit for a total of 278 days.

IV. DISPOSITION

The amount of presentence credits is to be changed to 278 days which includes 35 days of conduct credit. Upon issuance of the remittitur, the superior court clerk is directed to correct the abstract of judgment to reflect defendant's presentence credits of 278 days, including 243 actual days and 35 days of conduct credit. The superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J. ARMSTRONG, J.